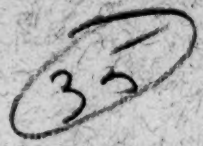

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 357

THE INDUSTRIAL BOARD OF THE STATE OF NEW YORK,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY,
EMPLOYER AND SELF-INSURER.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JOHN J. BENNETT, JR.,
Attorney General of the
State of New York,
Counsel for Petitioner.

INDEX.

Subject Index.

Index of Authorities Cited.

INDEX OF STATUTES CITED.

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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT FOR THE THIRD JUDICIAL DEPARTMENT OF THE STATE OF NEW YORK.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of the Industrial Board of the State of New York respectfully shows and alleges:

First: That your petitioner is a Board duly appointed and organized under the Laws of the State of New York to administer the Workmen's Compensation Law, known as and by Chapter 816 of the Laws of 1913 as re-enacted by Chapter 41 of the Laws of 1914 and the acts amendatory and supplemental thereto. That under the said Workmen's

Compensation Law, said Board, your petitioner herein, determines all questions within its jurisdiction unless reversed or modified on appeal. That appeals may be taken from awards or decisions of said Industrial Board to the Appellate Division of the Supreme Court, Third Judicial Department, of the State of New York. Section 23 of said Compensation Law provides that the Industrial Board shall be deemed a party to every such appeal and that the Attorney General shall represent said Board. It is also therein further provided that appeals may be taken to the Court of Appeals from the decisions and orders of the Appellate Division.

Second: This proceeding was brought under the Workmen's Compensation Law of the State of New York by Ernest Wright to secure compensation for serious permanent facial disfigurement, which resulted from accidental injuries sustained by him while employed by the New York Central Railroad Company. At the time of said accidental injury, the employer railroad was engaged in the operation of a railroad within the State of New York and extending to contiguous states and a foreign country, Canada.

The issue in this proceeding is whether the New York State Workmen's Compensation Law applies to the case or whether the sole remedy is provided by the Federal Employers' Liability Act (U. S. C. A. Title 45, Chapter 2).

Third: The facts in this case are as follows:

Ernest Wright, the claimant, was employed as a boilermaker by the New York Central Railroad Company (R. 16, 17, 23, 24, 31). He worked at the employer's Rensselaer engine house (R. 17, 23, 31). His hours of work were from 4 P. M. to 12 M (R. 34). His work consisted of all kinds of general repairs in the line of boiler work (R. 34).

All types of engines—passenger, freight and switch—came to the Rensselaer engine house for various classes

of repair and maintenance work (R. 34-35, 36). However, the claimant's work on the engines was "only as far as boiler work was concerned" (R. 36). The claimant testified that he was familiar with running repairs only as relating to boiler work, and nothing else (R. 36). He testified that most of his work was heavy repair work, done on engines withdrawn from service for two or three weeks at a time (R. 38, 39). He further stated (R. 39) that even if he worked on several engines during one day, these engines were definitely out of service, in fact, "*They would have to be dead engines to work on them*" (R. 39).

The claimant pointed out that the "hot gang" took care of incoming engines, or "live" engines (R. 39). He definitely stated that this was not his job (R. 39), so it is clearly apparent that he worked exclusively on engines which had been withdrawn from service.

The claimant was engaged in the foregoing work on five days of the week. It is not disputed that on the sixth day of each week, when the boiler inspector had his day off, the claimant acted in his stead, receiving 5 cents an hour extra therefor (R. 33, 34, 37, 39, 61). This he had been doing for five years (R. 34). It is also undisputed that the duties of boiler inspector, performed by the claimant on November 6th, 11th, 15th, and 20th in 1939, were in interstate transportation (R. 61-68).

On November 22, 1939, at about 9 P. M., the claimant was using an oxy-acetylene torch to burn rivets off a boiler. A spark from the torch was projected into a carbide can several feet away, and the resultant explosion blew the cover off the can. The cover hit the claimant in the face and the fumes from the can burned him on the face and neck (R. 16, 17, 30, 31).

The engine upon which the claimant was working at the time of the injury was a "dead" engine, one whose fires had been dumped after its withdrawal from service (R.

31, 32, 70). The engine tank was being patched and the water had to be emptied out before the job could be done (R. 31).

The engine was No. 5327, a passenger engine which had drawn train No. 43 from Harmon to Albany on the morning of November 22, 1939. The engine tank was leaking when the train arrived at Albany, so the engine was taken off the train and a relief engine was substituted to continue the trip to Buffalo and Suspension Bridge (R. 46-47, 48, 52). The testimony of the conductor of train No. 43 establishes that the train was in interstate transportation (R. 51-53).

Train No. 43 arrived in Albany at about 5:30 A. M. on November 22nd, and within three-quarters of an hour thereafter the engine was taken off the train and brought to the Rensselaer engine house. Then the fires were immediately dumped and the water drawn, the engine being ready for repairs before 8 A. M. (R. 50). The material for the repairs could not be secured from the West Albany shop until after 8 A. M. (R. 50). Between 8 A. M. and 4 P. M. the day gang cut out the leaking section of the engine tank, secured the new material from the shop, fitted it, and had it practically ready for welding at 4 P. M., when the claimant came on duty (R. 32, 40).

The claimant's accident occurred at 9 P. M. (R. 17) or 9:30 P. M. (R. 32), at which time there was work yet to be performed on the engine, such as driving rivets, chipping off weld, and grinding (R. 32). The claimant remained at the engine house until midnight, at which time the men were still working on the engine (R. 32).

Between midnight and 1 A. M. on November 23rd the work was finished and the engine was fired (R. 48, 49). At 1 A. M. the assistant terminal foreman (R. 45) assigned the engine to relief work (R. 47, 48, 49, 50). Several hours later the engine was sent to draw train No. 82. This train, due in Albany at 4:20 A. M., arrived late and blew for a

relief engine to continue its trip to Harmon (R. 47, 48, 49). The testimony of the conductor of train No. 82 establishes that the train was in interstate transportation (R. 54, 55).

It clearly appears in the record that prior to this assignment to interstate transportation, which assignment occurred at about 4:30 A. M. on November 23rd, engine No. 5327 had no assignment whatsoever (R. 50, 51). This was due to the fact that on a job of this kind the time of completion could not be definitely predicted (R. 33, 50-51). It also clearly appears in the record that engine No. 5327, the "dead" engine, was the only one on which the claimant worked during the day of his accident (R. 38, 40, 70).

Fourth: Upon the foregoing facts the Industrial Board found that at the time of the accident the claimant was not engaged in interstate commerce (R. 13-16), and awarded compensation for facial disfigurement in accordance with the terms of the New York State Workmen's Compensation Law (R. 12, 15). The Industrial Board thereby ruled against the contention of the employer railroad, which contention was that the claimant was subject to the Federal Employers' Liability Act, as amended on August 11, 1939, and was not subject to the provisions of the State Workmen's Compensation Law (R. 75).

Fifth: On appeal by the employer railroad to the Appellate Division of the Supreme Court, Third Judicial Department, the award made by the Industrial Board was reversed and the claim was dismissed. The decision for reversal was by a three to two vote (R. 81). A majority opinion was written by Bliss, J., in which Hill, P. J., and Crapser, J., concurred (R. 81, 82). A minority opinion was written by Heffernan, J., in which Foster, J., concurred (R. 83-93). The Industrial Board appealed to the Court of Appeals from the order of the Appellate Division. The Court of Appeals affirmed the order of the Appellate Division. No opinion was written and all judges concurred.

Sixth: The sole issue in this case is whether or not the claimant is subject to the Federal Employers' Liability Act, particularly Section 51 thereof, as amended on August 11, 1939. This has been the sole issue since the hearings began (R. 21, 27, 30, 55). The Industrial Board held that the claimant was not engaged in interstate commerce at the time of his injury and that the State Workmen's Compensation Law governed the claim. The self-insured employer railroad appealed to the Appellate Division of the Supreme Court, Third Judicial Department, contending that the claimant, because of the 1939 amendment to Section 51 of the Federal Act, came within the scope thereof and had no remedy under the State Workmen's Compensation Law.

The Appellate Division ruled that by the 1939 amendment to the Federal statute "the scope of the statute was so broadened as to include practically all employees of interstate carriers * * *." and that "The Act is now all inclusive and made so purposely." Thus the Industrial Board's position, that Congress, in amending the statute, did not intend to affect employees of the claimant's class, was held to be incorrect. The bases of the Industrial Board's position are dealt with in more detail in the brief annexed to this petition.

The minority opinion subscribed to the Industrial Board's contention that the scope of the amendment was limited and did not include the claimant. The minority opinion also maintained that the statute, if applicable to the claimant, is unconstitutional in that it interferes with the inherent and reserved right of the state to regulate its own local, domestic and internal commerce.

The aforesaid issue of statutory construction and interpretation, and the issue of constitutionality under the Federal Constitution were argued in the Court of Appeals of

the State of New York and were resolved against the Industrial Board without opinion.

Seventh. The Court of Appeals erred in deciding that the claimant had no remedy under the Workmen's Compensation Law and in relegating the claimant to his remedy under the Federal Employers' Liability Act, which demands that the claimant prove negligence on the employer's part before he can establish his claim. The decision of the Court of Appeals is completely at a variance with the intent of Congress in passing the 1939 amendment. The intent of Congress, as evidenced by the Senate Judiciary Committee Report and the minutes of the hearings held by said Committee, manifestly was to exclude employees of the claimant's class from the scope of the amendment and to leave undisturbed the availability of State compensation laws to such employees.

It appears that the 1939 amendment to Section 51 of the Federal Employers' Liability Act has not been the subject of review by the United States Supreme Court. For the further guidance of your petitioner in making compensation awards to employees of interstate railroads, said employees being thousands in number, and for the purpose of authoritatively determining the points of law herein involved, a review of the present case by this Court is necessary. The necessity is accentuated by the fact that injuries to railroad employees will undoubtedly increase, due to the capacity volume of railroad traffic incidental to our country's war program.

Eighth: This petition, as the foregoing premises indicate, presents substantial Federal questions, to wit: 1. What employees did Congress intend to include within the scope of the Federal Employers' Liability Act by its amendment to Section 51 of said Act? 2. If Congress intended by the amended statute to include practically all employees of

interstate carriers, whether or not the employees engaged in interstate activity, thereby taking their personal injury claims entirely out of the State Industrial Board's jurisdiction, is the statute constitutional?

Your petitioner argued these questions in the appellate courts of the State of New York. The Court of Appeals of the State of New York is the highest Court of said State in which could be had a decision of the contentions raised by your petitioner. Said Court of Appeals overruled said contentions, and by its order, made on the 18th day of June, 1942, and filed in the Appellate Division of the Supreme Court, Third Judicial Department, on the 25th day of June, 1942, affirmed the order of the Appellate Division entered March 12, 1942, reversing the Industrial Board's award and dismissing the claim. The Court of Appeals sent down its remittitur, dated June 18, 1942, consisting of a copy of said order of the Court of Appeals and the papers upon which said Court made its order, and said remittitur was filed on the 25th day of June, 1942 in the office of the Clerk of the Appellate Division of the Supreme Court, Third Judicial Department, where said remittitur now remains of record. Upon said remittitur a final order, of which your petitioner seeks examination and reversal by this Court, was entered on June 25, 1942 in the office of said Clerk, whereby the said order of the Court of Appeals became the order of the Appellate Division and whereby the costs of said appeal to the Court of Appeals were awarded against the petitioner herein.

The final order entered on the 25th day of June, 1942, as aforesaid, whereby the said order and judgment of the Court of Appeals became the final order of said Appellate Division, was made pursuant to a decision which was in favor of a right, privilege or immunity set up by the respondent, to wit: that the respondent was not liable for compensation for the claimant's facial disfigurement for the

reason that at all times he came within the scope of the Federal Employers' Liability Act, as amended on August 11, 1939, and was not entitled to compensation under the statutes of the State of New York. Further, the said decision passed upon a question concerning the constitutionality of a statute of the United States.

WHEREFORE, your petitioner prays that a writ of certiorari be allowed and issued, directed to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York, commanding said Appellate Division to certify and send to this Court a full and complete transcript of the records or proceedings of said Court in this case to the end that said case may be reviewed and determined by this Court, as provided by law, and that your petitioner may have such other and further relief in the premises as to the Court may seem just and that the said judgment of the Court of Appeals, if errors be found therein, be corrected in conformity with law.

INDUSTRIAL BOARD OF THE STATE OF
NEW YORK,
By RICHARD J. CULLEN,
Chairman.

STATE OF NEW YORK,
County of New York, ss.:

Richard J. Cullen, being duly sworn, deposes and says: That he is Chairman of the Industrial Board of the State of New York; that he has read the foregoing petition and knows the contents thereof; that same is true of his own knowledge except as to those matters therein stated to be alleged upon information and belief, and as to those matters he believes them to be true.

RICHARD J. CULLEN.

Sworn to before me this 5th day of Aug., 1942.

DAVID KETT,
Notary Public.

I hereby certify that I have examined the foregoing petition; that in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted by the Supreme Court.

JOSEPH A. McLAUGHLIN,
Assistant Attorney General,
Of Counsel, for the Industrial Board of the State of New York.